IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPLICATION NO.3231 OF 2004

Nilesh Jap Daru,
101/A trupti Housing Society
Sector-8,Nerul,Navi Mumbai .. Petitioner
vs
The State of Maharashtra, .. Respondent
Ms. M.Adenwalla with Mr Y.M.Chaudhari, for the applicant.
Mr A.S.Gadkari, APP for the respondent.

CORAM : D.B.BHOSALE,J.
DATE : 19th AUGUST, 2004.

JUDGMENT:

1. Heard the learned counsel for the parties.

2. The petitioner has filed this application under section 407 of Cr.P.C seeking transfer of Sessions Case No.272 of 1996 from the Court presided over by the learned Addl.Sessions Judge, Shri A.R.Mahajan to any other Sessions Court in Mumbai Division. The application filed by the petitioner seeking transfer under section 408, bearing Misc. Application No.833 of 2004, has been rejected by the judgment and order dated 16.7.2004 rendered by the Principal Judge of the Court of Sessions for Greater Bombay.

3. According to the petitioner, the conduct of the learned Judge and his attitude towards him, most clearly evidenced by the events of 10/6/04 and 11/6/04, has given rise to a strong and reasonable apprehension in his mind that the learned Sessions Judge is determined to take him into custody on some pretext or the other.

In short, according to the petitioner, the conduct of the concerned learned Sessions Judge has resulted in his loosing faith that he would have a fair and unbiased trial at his hands. The petitioner has, therefore, prayed that it would not be in the interest of justice nor would it convey an impression that the justice had been done if the trial was to continue before the said learned Sessions Judge.

4. The factual matrix, that would be relevant and material for deciding this application, in brief, is as follows. The petitioner was arrested on 28.8.95 in C.R.No. 495/95 under section 302 of Indian Penal Code for allegedly committing murder of his neighbour. It is the case of the petitioner that since 1977 he was suffering from paranoid schizophrenia and has been undergoing treatment for his ailment till this date. Under the judicial order, he was shifted to the mental health institution (for short "the said hospital") for treatment where he remained for about five months from 28.10.95 to 21.3.296. The petitioner was granted bail by order dated 5.2.1996 while he was in the said Hospital. The petitioner has specifically mentioned in this application that apart from his appearances before the learned Sessions Judge prior to July, 2003, he has attended ten dates of hearings commencing from 3.7.03 to 1.4.04 in his case. He has further stated that he has

diligently attended the Court and never missed a single date of hearing till this date. His family members also used to accompany him to the Court.

. It is in this backdrop the case was fixed for recording of evidence on 15.4.2004. His Advocate Prabhakar Vaidya, who was on record till 15.4.2004, introduced the petitioner to one Advocate Santosh Deshpande, who agreed to take the case of the petitioner. He filed his vakalatnama on 15.4.2004. On 7.6.04, his advocate Deshpande filed an application, bearing Misc.Application no.761 of 2004 under section 329 of Cr.P.C, claiming that the petitioner was mentally unfit to stand trial. On that date, for the first time, the witnesses were also summoned and they were present and in view thereof the Court directed the petitioner to pay cost to the witnesses and adjourned the matter to 9.6.2004 with direction that he should produce medical certificate in support of his case of mental illness.

On 9.6.2004, the matter was adjourned to 10.6.04.

. The events of 10.6.04 and 11.6.04, according to the petitioner, gave rise to a strong and reasonable apprehension in the petitioner's mind that the concerned learned Judge was determined to take him into custody on some pretext or the other. On 10.6.04, Advocate Deshpande could not appear. However, his assistant, (Advocate Jaiswal), was present in the Court. According

to the petitioner, Advocate Jaiswal attempted to submit the medical certificates which the learned Judge refused to accept on the ground that they were not endorsed as true copies and signed by Advocate Deshpande on record. The learned Judge, according to the petitioner, refused to permit Advocate Jaiswal to make submission as he was not an advocate on record. It is further stated in the petition that the learned Judge then insisted that the petitioner should file an affidavit as to why his Advocate Deshpande was not present in the Court. Such affidavit was filed by the petitioner. He has further alleged that the learned Judge called him into the witness-box and told him that he was forthwith cancelling his bail and sending him to the jail for 1-1.1/2 months as that would teach his lawyer to remain present on each date of hearing. The petitioner further submitted that he got frightened and requested the learned Judge that he was undergoing the treatment of paranoid schizophrenia and instead of sending him to the jail, he be sent to the said hospital. However, according to the petitioner, the learned Judge was determined to send him to the jail to ensure his and his lawyer's presence at the trial. Ultimately, the Court adjourned the case to 11.6.2004 at 1.00 pm. The learned Judge, according to the petitioner, also made it clear that if his lawyer was not present on the next date, he

would be taken into custody and sent to Arthur Road Jail.

. On the next date, since advocate Deshpande was not in a position to attend the Court on 11.6.2004, he gave no objection to the petitioner on the vakalatnama and told the petitioner to engage some other advocate. The petitioner collected the vakalatnama with no objection and signature of Deshpande Advocate from his assistant on 11.6.2004 at 11 am and presented the same before the learned Judge. According to the petitioner, the reaction of the learned judge on 11.6.2004 was most alarming and caused him not only the great anguish but also resulted in his loosing all faith in ever getting a fair and unbiased trial from the learned Judge. The learned Judge, on the petitioner presenting the vakalatnama with no objection, called the police personnel and told him to take the petitioner into custody. He was also, according to the petitioner, compelled to put into writing all that he stated in the witness-box.

. The learned Advocate for the petitioner, who was incidently present in the Court, made an attempt to argue on his behalf but the learned judge refused to hear him on the ground that his vakalatnama was not on record. The petitioner's advocate did file vakalatnama and tried to convince the Court that there was no need

to take the petitioner into custody, however, the learned Judge refused to release the petitioner from custody. Even the learned Judge refused to allow the petitioner to withdraw his Misc Application No.961 of 2004 and dictated the order dated 11.6.2004 directing police to take him into custody. The advocate for the petitioner filed an application for stay of the said order but the said application was rejected and the petitioner was directed to be taken into custody and the matter was adjourned to 17.6.2004. On the very same day, at 4.45 pm, the petitioner's lawyer moved this Court and obtained stay to the order dated 11.6.2004. This Court directed that the petitioner be released, if taken into custody. The petitioner was further directed to file a regular application before the next date, i.e. 15.6.2004. The petitioner, accordingly, filed Criminal Writ Petition No.1154 of 2004 before this Court which was disposed of and the order dated 11.6.2004 was set aside and the petitioner was also permitted to withdraw Misc. Application No.761/04. While disposing of Writ Petition No.1151 of 2004 by order dated 16.6 2004, this Court granted liberty to the petitioner to file an application for transfer before the Sessions Court. It is in this backdrop the petitioner filed Misc. Application No.833 of 04 before the Sessions Court which

came to be rejected by order date 16.7.2004.

5. The learned Principal Judge, while disposing of the application seeking transfer, in concluding paragraph no.60, held thus:

> "60. ... ... assuming for the time being as stated by the applicant what is correct in para 10, the cause is the applicant himself. Had the advocate for the applicant remained present on earlier dates and had the applicant and advocate remained ready to go on with the matter when 10 witnesses were present, such incident could not have arisen and at least out of ten witnesses, three or four witnesses could have been examined, but in the instant case as can be seen, none of the witnesses were examined. From 13.6.2004 till the time witnesses appeared in Court on 7.6.2004, the applicant chose to keep quiet and did not file the said M.A.No.761 of 2004. Only on the date when the 10 witnesses were present and the matter was to be proceeded with, the said M.A.No.761 of 2004 came to be filed. Hence, therefore, it cannot be said that the fault lies only with the

Court, but the cause also lies with the applicant/accused in not proceeding with the matter and/or in not producing the documents of schizophrenia and treatment from 13.6.2003 to 7.6.204 practically for a period of one year."

6. I have perused a copy of the petition and other material placed before me including the judgment and order dated 16.7.2004 passed by the learned Principal Judge, Sessions Court for Greater Mumbai. It is clear from the observations made in the judgment by the Sessions Court that the Advocate, who was on record, annoyed the learned Judge by his conduct which is also evident from the facts narrated in the petition as also reflected in the aforestated paragraph of the judgment. This case is pending since 1995 and on 10.6.2004 ten witnesses were present in the Court. Instead of going on with the case, the application was filed on behalf of the petitioner by the Advocate under section 329 of Cr.P.C which obviously gave an impression that it was a part of delaying tactics. However, fact remains as to whether the trial Court was justified in directing the police personnel to take the petitioner into custody while disposing of the application under section 329 of Cr.P.C without looking into the medical certificates which, according to the petitioner, Advocate Jaiswal

attempted to tender in the Court. The order was subsequently set aside by this Court. Therefore, the only question that arises for my consideration in the instant petition is whether the grounds made out by the petitioner are sufficient enough to exercise the powers under section 407 of Cr.P.C and transfer the case from the concerned learned Judge to any other learned Sessions Judge in Mumbai Division.

7. Keeping in view the overall facts and circumstances of the case, I agree with the learned Sessions Judge that the proceedings of the case and the order dated 11.6.2004 does not reveal any bias against the petitioner. At the worst, they show the concerned Judge's annoyance at the failure on the part of the learned Advocate for the petitioner to be present in his Court when the case was taken up for hearing on 10.6.2004 and 11.6.2004. It is now well settled that in considering the expediency of directing a transfer for the ends of justice, it is essential to decide not merely the question whether there has been any real bias in the mind of a Judge but also the further question whether the incidents happened in the court create in the mind of an accused a reasonable apprehension that he may not have a fair and impartial trial. In other words, it often becomes necessary to consider whether there is a reasonable ground for assuming the

possibility of bias and whether it is likely to produce in the mind of a litigant or public at large a reasonable doubt about fairness of administration of justice. It would always be a question of fact to be decided in each case. The events in the Court dated 10.6.2004 and 11.6.2004 followed by the order dated 11.6.2004 passed in Misc. Application No.761 of 2004, in my opinion, are sufficient to create such apprehension in the mind of the petitioner that he would not get justice from the concerned Judge. The said order was ultimately quashed and set aside by this Court by order dated 16.6.2004. Though I do not believe that the petitioner will not get justice from the learned Judge, the things have taken such a turn in this case as to make the petitioner apprehensive that he will not get a fair trial from the learned Judge. In the circumstances, in my opinion, the learned Sessions Judge should not have rejected but allowed the application of the petitioner under section 408 of Cr.P.C.

8. In the result, this petition is allowed. The impugned judgment and order dated 16.7.2004 rendered by the learned Sessions Judge in Misc. Application No.833 of 2004 is hereby quashed and set aside. The application seeking transfer stands allowed. The learned Sessions Judge to transfer the petitioner's case from the file of Shri A.R.Mahajan, Addl. Sessions

Judge, to the file of any other learned Sessions Judge in Mumbai Division for disposal. The petitioner is directed to cooperate with the hearing of the case. The learned Sessions Judge, to whom the matter would be transferred in pursuance of this order, shall endeavour to dispose of the trial as expeditiously as possible and preferably within a period of nine months from the date of its transfer. The application is, accordingly, disposed of.

. An authenticated copy of this order may be made available to the parties.

(D.B.Bhosale, J.)

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